

**IN THE COURT OF TAX APPEALS
STATE OF KANSAS**

Pursuant to K.A.R. 94-5-1(b), the Court hereby adopts the following Directive relating to practice before the court:

DIRECTIVE 2014-01
**Signatures on Notices of Appeal Filed with
the Small Claims and Expedited Hearings Division
on Behalf of Artificial Entities**

Our regulation – K.A.R. 94-5-4(b) – provides that “all notices of appeal . . . shall be . . . signed by the party or party’s attorney. . . .” The Court directs that this signature requirement is satisfied when a notice of appeal filed with the Small Claims and Expedited Hearings Division of this Court (the “Small Claims Division”) on behalf of an artificial entity is signed by either (i) an attorney; or (ii) a person who has an ongoing and substantial connection to such entity.

Consistent with and elaborating on K.A.R. 94-5-6(b), the Court directs that the following qualify as persons who have an ongoing and substantial connection to their applicable entity:

- (a) authorized officers, directors, stockholders, and full-time employees of corporations;
- (b) authorized officers, members, managers, and full-time employees of limited liability companies;
- (c) authorized officers, general partners, and full-time employees of general partnerships;
- (d) authorized officers, general partners, limited partners, and full-time employees of limited partnerships.

Comment

This Directive does not relate to and has no effect on the defectiveness of a signature on a notice of appeal filed on behalf of an artificial entity when such signature is by a person who does *not* have an ongoing and substantial connection to the entity. What constitutes an ongoing and substantial connection is outlined in the Directive.

Our regulation – K.A.R. 94-5-1(b) – expressly authorizes “[d]irectives guiding . . . practice before the court . . . if the directives do not conflict with this article [K.A.R. 94-5-1 et seq.] or other applicable provisions of Kansas law.” “Practice before the court” in turn embraces the question of whether and to what extent nonlawyers can represent taxpayers and participate in tax appeal cases. *See* K.S.A. 77-515. This Directive is consistent with our regulations regarding nonlawyer participation in cases on behalf of entity taxpayers. *See* K.A.R. 94-5-6.

This Directive is also consistent with other applicable Kansas law based primarily on *Babe Houser Motor Co., Inc. v. Tetrault*, 270 Kan. 502, 14 P.3d 1149 (2000), which dealt with procedural practice in judicial branch small claims cases. In that case, the Kansas Supreme Court clearly held that a nonlawyer without “an ongoing and substantial connection” to an entity could not represent the entity in any case, judicial branch small claims or otherwise. *Id.* at 508-09, 14 P.3d 1153-54. On the other hand, we also know from *Babe Houser* that it is not the unauthorized practice of law for a person with an ongoing and substantial connection to the entity to participate in judicial branch small claims cases on behalf of such entity. *Id.* This participation includes the signing and filing of initial small claim documents or petitions on behalf of such entity. *Id.* at 502-03, 506-09, 14 P.3d at 1150, 1152-54. We have defined an “ongoing and substantial connection” in this Directive to embrace only those situations that have at least some meaningful connection apart from the tax appeal litigation. This is consistent with *Babe Houser*. If a litigation connection alone were sufficient to qualify as ongoing and substantial, then the connection requirement would become meaningless. If a litigation connection alone were enough, then there would be a sufficient connection *in every case*, and this would clearly contradict the holding in *Babe Houser*.

The requirement in this Court that a notice of appeal can only be signed by a party or an attorney has been in place, pursuant to the Court’s (and predecessor Board’s) rules, for many years. Our current rules set forth the requirement that “all notices of appeal . . . shall be . . . signed by the party or party’s attorney. . . .” K.A.R. 94-5-4(b). The prior regulations also had the exact same requirement and applied at least as early as 1997. *See* 1999 K.A.R. Supp. 94-2-1(d) and 94-2-3(a)(7). This has been a long-standing rule. It reflected guidance given by an Attorney

General Opinion issued in 1993 and a Kansas Court of Appeals decision rendered in 1997.

In 1993, this Court's predecessor – the Board of Tax Appeals ("BOTA") – requested guidance and an opinion from the Kansas Attorney General about what conduct by nonlawyers was permitted in cases before BOTA. In its opinion, the Attorney General gave the following synopsis:

In board of tax appeals proceedings conducted in accordance with the Kansas administrative procedures act, . . . a non-attorney representative may not engage in the unauthorized practice of law and therefore may not examine witnesses, file pleadings, make legal arguments, or perform other functions deemed to be the practice of law.

Ks. Atty. Gen. Opin. No. 93-100 (July 26, 1993). The attorney general concluded by stating that examination of witnesses, presenting and objecting to evidence, making legal arguments, and filing pleadings "are functions that we believe the courts would consider as the practice of law and therefore can only be performed . . . by an individual or entity representing itself, or by [a licensed attorney]." *Id.*

The second prong that provided a foundation for this Court's (and the predecessor Board's) rule is *Atchison Homeless Shelters, Inc. v. County of Atchison*, 24 Kan. App. 2d 454, 946 P.2d 113 (1997), *rev. denied*. In that case, the Kansas Court of Appeals rejected an appeal by a corporation whose notice of appeal was not signed by an attorney and the court allowed for no opportunity to correct the defective signature.¹ The court noted that corporations can only be represented in Kansas courts by an attorney duly licensed to practice law in Kansas:

Kansas follows the common-law rule that an appearance in court of a corporation by an agent other than a licensed attorney is not proper since a corporation is an artificial entity without the right of self-representation.

Id. at 455, 946 P.2d at 114. The court then held that it did not have subject matter jurisdiction over the appeal. *Id.*

¹ The opinion in *Atchison Homeless Shelters* indicates that an attorney did *not* sign the notice of appeal, but gives no indication of who actually *did* sign the notice of appeal – whether it was a person with an ongoing and substantial connection to the corporation (such as an officer or full-time employee) or some nonlawyer who was otherwise unaffiliated with the corporation.

In 1998, K.S.A. 74-2433f was adopted, creating this Court's Small Claims Division. This invites the question whether an analogy should be drawn between tax appeals in this Court's Small Claims Division and small claims cases in the judicial branch ("Judicial Branch Small Claims") so that a nonlawyer can sign notices of appeal for an entity taxpayer. This analogy question requires some examination of Judicial Branch Small Claims and the *Babe Houser* case.

The district courts of Kansas are part of the judicial branch under Article III of the Kansas Constitution. Judicial branch district courts have general jurisdiction over legal cases and exercise broad judicial power. Cases before the district courts generally fall into one of three categories: (i) regular "Chapter 60" cases pursuant to the code of civil procedure (K.S.A. Chapter 60);² (ii) limited action cases pursuant to the code of civil procedure for limited actions (K.S.A. Chapter 61); and (iii) Judicial Branch Small Claims pursuant to special provisions in the code of civil procedure for limited actions (referred to as the small claims procedure act and set forth in K.S.A. 61-2701 *et seq.*). In Chapter 60 and limited action cases, parties can only be represented by attorneys (or they can act *pro se* – that is, for themselves); they cannot be represented by nonlawyers. *See, e.g., Atchison Homeless Shelters*, 24 Kan. App. 2d at 455, 946 P.2d at 114. Judicial Branch Small Claims, however, embrace the polar opposite: Attorneys are generally *prohibited* from representing parties therein. K.S.A. 61-2707.

Judicial Branch Small Claims are strictly limited in terms of value. The amount of money or property involved in the claim cannot exceed \$4,000. K.S.A. 61-2703(a).³ As noted above, attorneys are generally prohibited from representing parties: "[N]o party in any such action shall be *represented* by an attorney prior to judgment." K.S.A. 61-2707.⁴ In the very next sentence of that statutory provision, the small claims procedure act expressly authorizes "a party [to] *appear* by a full-time employee or an officer. . . ." *Id.* (emphasis added). The use of the word "appear" should be particularly noted relative to the word "represented" used in the immediately prior sentence. Although this statutory provision also purports to authorize a party to appear by "any person in a representative capacity so long as such person is not an attorney," its effect is severely limited by another statutory

² This "Chapter 60" category also includes cases arising under other statutory chapters such as probate cases pursuant to K.S.A. Chapter 59.

³ This dollar limitation is exclusive of interest and costs. *Id.*

⁴ There are a few exceptions to this rule. For example, an individual party who also happens to be an attorney can appear on his or her own behalf in Judicial Branch Small Claims. K.S.A. 61-2714. Also, an entity party can be represented by an officer or employee who also happens to be an attorney. *See* K.S.A. 61-2707(a) and 61-2714(a). In such limited circumstances when an attorney is permitted, then all other parties in the case can use an attorney as well. K.S.A. 61-2714(a).

provision that expressly excludes from Judicial Branch Small Claims any claim filed for a party by a person who “is not a full-time employee or officer” of the party. K.S.A. 61-2703(a)(2). This last point has major significance in the *Babe Houser* case discussed below.

It was not long before it became an issue how to reconcile the prohibition against attorneys in Judicial Branch Small Claims with the common law rule that corporations could only appear in court *through* an attorney. Was the small claims procedure act an improper usurpation of the judiciary’s inherent power to regulate and define the practice of law? This issue was directly addressed by Kansas Attorney General Opinion No. 95-100 (October 10, 1995). It concluded that “a corporation may *participate* in small claims court through an agent who is not licensed to practice law.” *Id.* at p.3. The opinion also analyzed whether this conduct constituted the unauthorized practice of law and stated as follows: “We cannot conclude that every representative of a corporation engages in the practice of law simply by filling out a [statement of claim] form and appearing in small claims court.” *Id.* at p.4. The Attorney General then noted the following important qualification:

We hasten to note that our interpretation of the small claims procedure act only extends to allowing corporate agents to *participate*. It does *not authorize corporate representatives to practice law*. A corporate representative who appears in small claims court and conducts direct and cross examination of witnesses, presents and objects to evidence and makes legal arguments may be engaging in the practice of law. (Attorney General Opinion No. 93-100). . . . We have no facts upon which to base a conclusion that the unauthorized practice of law is occurring in small claims courts throughout the state of Kansas and, therefore, it is our opinion that the legislature is not usurping the judiciary’s power to regulate the practice of law by allowing nonlawyer corporate representatives to *appear* in small claims courts.

Id. (emphasis added).

A few years after the attorney general opinion, the issue finally reached the Kansas Supreme Court in *Babe Houser*. In that case, a corporation filed a claim in Judicial Branch Small Claims against a customer who had failed to pay a repair bill. Mr. Houser was the president and a full-time employee of the corporation. He filed the claim for and appeared on behalf of the corporation in small claims court. The small claims court, however, applied the *Atchison Homeless Shelters* decision and dismissed the case because the corporation was not represented by a licensed attorney. The corporation appealed to the district court, which affirmed the

dismissal, holding that corporations could only be represented in court by a licensed attorney and parties could appear in small claims only if they did not have an attorney; thus, corporations could not take advantage of Judicial Branch Small Claims. The case was then appealed to the Kansas Supreme Court.

The court began its analysis by noting that the small claims procedure act was a legislative response to the “perceived need for a practicable and economic way in which parties may litigate small claims simply, without the benefit or expense of an attorney.” 270 Kan. at 503-04; 14 P.3d at 1151. “The [small claims procedure act] was designed to foster simplicity of pleading and provide a forum for the speedy trial of small claims.” *Id.* at 504; 14 P.3d at 1151. The court held that the small claims procedure act, including its provision allowing corporations to be represented by nonlawyers, was a sound and proper response to the identified needs and purposes. *Id.* at 507; 14 P.3d at 1153. Such an approach for very small claims – which, among other things, excludes attorneys and thus seeks to authorize corporations to appear through nonlawyers – is necessary because “‘justice should not be a rich man’s luxury’ and . . . ‘the expense of employing an attorney and paying normal court costs is more than the cause will bear.’” *Id.* The court also noted that the decision in *Babe Houser* did not undermine the holding in *Atchison Homeless Shelters* because the latter case did not involve Judicial Branch Small Claims. *Id.* at 508; 14 P.3d at 1153. In other words, the court limited the effect of *Babe Houser* so that it applies only to Judicial Branch Small Claims. *Id.* at 509; 14 P.3d at 1154 (“We limit our decision to the facts of this case.”). Therefore, *Atchison Homeless Shelters* remains as good law for all other circumstances and cases, including tax appeals before the Regular Division of this Court. *Id.* at 508; 14 P.3d 1153-54.

In its decision, the Kansas Supreme Court took special note of the provision in the small claims procedure act – K.S.A. 61-2703(a)(2) – that excludes any claim filed for a party by a person who “is not a full-time employee or officer” of the party. *Id.* at 505; 14 P.3d at 1152. Another provision of the small claims procedure act, however, states that “a party may appear by a full-time employee or officer *or any person in a representative capacity.*” K.S.A. 61-2707(a) (emphasis added). A question of concern arose from one of the justices during oral argument regarding the proper construction of K.S.A. 61-2707(a), and “whether this language unduly expanded representation to include third parties not otherwise associated with the corporation.” 270 Kan. at 508; 14 P.3d at 1153. The corporation’s counsel, in response to this question, pointed the court to the severely limiting language of K.S.A. 61-2703(a)(2). 270 Kan. at 508; 14 P.3d at 1153. The Kansas Supreme Court then held as follows:

. . . [W]e read the [small claims procedure act’s] inclusion of the “full-time” modifier in both K.S.A. 1999 Supp. 61-2703(a)(2) and K.S.A.

1999 Supp. 61-2707(a) as a prophylactic measure designed to ensure that only those who have *an ongoing and substantial connection* with a corporation will be permitted to represent it in small claims court. The legislature's inclusion of this limiting language means that *unrelated third parties are not permitted to file or pursue small claims on behalf of corporations*. We believe this interpretation balances the interest protected by the rule in *Atchison Homeless Shelters, Inc.*, 24 Kan. App. 2d 454, 946 P.2d 113, for district and appellate court proceedings, with the Act's interest in providing accessible, affordable justice to those whose claims are too small to merit attorney involvement.

Finally, our decision should in no manner be construed as an abandonment or limitation of our mandated control over the court system or the practice of law.

We limit our decision to the facts of this case. . . .

Id. at 508-09; 14 P.3d at 1153-54. In other words, implementing its constitutional authority pursuant to Article III of the Kansas Constitution, the Kansas Supreme Court held that it was not unauthorized practice of law for a corporation to be represented in Judicial Branch Small Claims by a nonlawyer representative *who is a full-time employee or officer of that corporation*. The court thus gave its seal of approval to the small claims procedure act authorizing such nonlawyer representation with the noted limitations. The impact for other court situations, including cases in this Court's Regular Division and its Small Claims Division, is clear: At a minimum, it is unauthorized practice of law if there is an attempt to represent a party (or taxpayer) by a third person who does not have *an ongoing and substantial connection with that party (or taxpayer) such as being an officer or full-time employee*.

Should the principles established in *Babe Houser* apply by analogy to this Court's Small Claims Division? There are both similarities and differences between Judicial Branch Small Claims and this Court's Small Claims Division. For an example of similarity, both courts are designed to provide a forum for the speedy trial of cases: very small claims in the former, and relatively small tax appeals in the latter. Also, decisions from both courts may be appealed to the next level (to a district judge with the former, and to this Court's Regular Division for the latter), where the applicable court conducts a *de novo* hearing and determination. See K.S.A. 61-2709 and K.S.A. 74-2433f(d).

Significant differences, however, also exist between the two types of courts. First, claims filed in Judicial Branch Small Claims are original claims initiated by a simple statement of claim or petition. In contrast, tax appeals to this Court are exactly that: appeals of a prior governmental administrative decision (and not an original claim). Second, attorneys are prohibited in Judicial Branch Small Claims.

Attorneys are permitted, however, in this Court, including its Small Claims Division. The purpose for Judicial Branch Small Claims is to provide a forum in which small claims can be handled simply and cost-effectively without attorneys. The whole point of Judicial Branch Small Claims is to mandate minimal cost in resolving small cases. If attorneys were generally permitted in Judicial Branch Small Claims, such claims might well be effectively precluded because the cost of pursuing or defending them with an attorney would be severely prohibitive. That is not the situation with this Court's Small Claims Division, where attorneys are permitted and the potential amounts at issue are much larger than with Judicial Branch Small Claims.

We conclude, on balance, that the principles of *Babe Houser* should apply to our Small Claims Division. First, no Kansas appellate case prohibits a nonlawyer's signature on an entity's notice of appeal to our Small Claims Division *as long as* the nonlawyer has an ongoing and substantial connection to that entity. Second, *Babe Houser* does not appear to prohibit outright its application to administrative tribunals even though the Kansas Supreme Court limited its "decision to the facts of this case [Judicial Branch Small Claims]." *Id.* at 509, 14 P.3d at 1154. Indeed, the court implied that *Babe Houser* was justified in part by nonlawyer representation of entities that already occurred in administrative agencies. The court noted that the Kansas Administrative Procedure Act ("KAPA") – particularly K.S.A. 77-515 – permits participation by a nonlawyer when an entity is involved. *Id.* at 507, 14 P.3d at 1153. And KAPA generally controls the conduct of proceedings before this Court. *See* K.S.A. 74-2426(a).

It is appropriate, however, to limit application of the *Babe Houser* principles to this Court's Small Claims Division and *not* apply them to our Regular Division. Unlike any other administrative court in the state, this Court's Regular Division is a "court of record." Appeals from this Court proceed directly to the Kansas Court of Appeals. K.S.A. 74-2426(c)(2). *See also* K.S.A. 74-2426(c)(1) (unlike other administrative agencies, this Court is not a party to any action for judicial review of its decisions; rather, the parties on appeal are the same parties as appeared before this Court). The Kansas Code of Judicial Conduct, Ks. Sup. Ct. Rule 601B, applies to this Court and its judges the same as it does to district court judges. K.S.A. 74-2433(a). This Court, like a district court, is bound by the doctrine of *stare decisis*. *Id.* In some instances, this Court is viewed as comparable to a district court. *Trickett*, 27 Kan. App. 2d at 656, 8 P.3d at 23 ("When performing a judicial function such as holding a contested hearing, BOTA [the Court of Tax Appeal's predecessor] is analogous to a district court. . . ."). For all these reasons, *Babe Houser* should not apply to this Court's Regular Division and we thus limit the application of this Directive to our Small Claims Division. Instead, the holding of *Atchison Homeless Shelters* fully and properly applies to our Regular Division because it operates as the functional equivalent of a district court when adjudicating tax appeal cases. *See*

Babe Houser, 270 Kan. at 508, 14 P.3d at 1153-54 (“[T]he rule in *Atchison Homeless Shelters* . . . [is] for district and appellate court proceedings. . .”).

BY ORDER AND DIRECTIVE OF THIS COURT,
this 3rd day of March, 2014



THE KANSAS COURT OF TAX APPEALS

SAM H. SHELDON, CHIEF JUDGE

JAMES D. COOPER, JUDGE

RONALD C. MASON, JUDGE

JOELENE R. ALLEN, SECRETARY